Supreme Court, U.S.
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In The

Supreme Court of the United States

LYDIA COLOMBO,

Petitioner,

vs.

RAYMOND O'CONNELL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should A State Actor Intending To Chill The Speech Of A Private Citizen Be Relieved Of Liability Because The Citizen Was Not "Actually Chilled"?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Petition for a Writ of Certiorari	1
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	5
Conclusion	11

TABLE OF AUTHORITIES

Page

CASES:

Bloch v. Ribar, 156 F.3d 673 (6th Cir. 1998).....6, 8, 9

Carroll v. Blinken, 105 F.3d 79 (2d Cir. 1997).....10

Connell v. Signoracci, 153 F.3d 74 (2d Cir. 1998)..... 6

Crawford-el v. Britten, 93 F.3d 813 (D.C. Cir. 1996) (en banc), *rev'd on other grounds,* 523 U.S. 574 (1998)..... 6

Curley v. Village of Suffern, 268 F.3d 65 (2d Cir. 2001)..... 6

Farrar v. Hobby, 506 U.S. 103 (1992).....10

Gibeau v. Nellis, 18 F.3d 107 (2d Cir. 1994) 10

King v. Macri, 993 F.2d 294 (2d Cir. 1993).....10

Laird v. Tatum, 408 U.S. 1 (1972)..... 8

Lee v. Edwards, 101 F.3d 805 (2d Cir. 1996).....10

McCardle v. Haddad, 131 F.3d 43 (2d Cir. 1997).....10

Memphis Community School District v. Stachura, 477 U.S. 299 (1986).....10

Mendocino Environmental Center v. Mendocino County, 192 F.3d 1283 (9th Cir. 1999) 6

Robinson v. Cattaraugus County, 147 F.3d 153 (2d Cir. 1998).....10

Sullivan v. Carrick, 880 F.2d 1 (1st Cir. 1989)..... 6

Worrell v. Henry, 219 F.3d 1197 (10th Cir. 2000)..... 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 2, 5, 9, 10

OTHER:

W. LaFave & A. Scott, Handbook on Criminal Law (2d ed. 1972) 7

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Lydia Colombo, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was rendered on November 4, 2002, and was published at 310 F.3d 115 (2002). It is printed as Appendix A to this petition. The opinion of the United States District Court for the District of Connecticut upon which the Court of Appeals based its ruling was rendered on December 27, 2001. It was not published. It is printed as Appendix B to this petition.

JURISDICTION

The United States Court of Appeals for the Second Circuit rendered its decision on the petitioner's appeal on November 4, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble,

and to petition the Government for a redress of grievances."

42 U.S.C. § 1983 provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This is a very simple case. The petitioner was a community activist in the Town of Stratford, Connecticut. On August 1, 2000, she, together with others, filed a petition with the Town of Stratford's clerk requesting a recall election for the members of the Stratford Board of Education. The petitioners contended in the petition that the board had concealed "illegal and unethical behavior on the part[] of the superintendent." The respondent, Raymond O'Connell, the school superintendent, caused a letter to be sent to the petitioner threatening legal action if the petition was not retracted. The petitioner did not retract her petition, and she testified at her deposition that the superintendent's letter did not change her behavior. Neither did the letter cause her to become more guarded in her comments about the superintendent.

The respondent had his lawyer send the following letter to the petitioner and others:

Dear Sir/Madam:

Please be advised that I represent Raymond O'Connell, who, as you know, is superintendent of schools in the town of Stratford.

Under date of August 1, 2000 you filed a petition request with the Stratford town clerk in which you stated in writing that each member of the Board of Education concealed from investigation and condoned "illegal and unethical behavior on the part(s) of the superintendent . . . "

Your statement that Mr. O'Connell engaged in illegal and unethical behavior is totally false and untrue, is calculated to injure Mr. O'Connell in his profession, and is libelous.

Unless the libelous charge is retracted in as public a manner as that in which it was made, within ten days from date hereof, legal action will be instituted for damages.

The petitioner testified at her deposition that notwithstanding this letter, her behavior did not change.

Q. And as a result of receiving that letter, did you sit down with Mrs. Anzalone and Mr. Purcell and prepare a response to that letter?

A. No. We didn't really sit down. I was very upset when I saw those things in the paper. When I saw all of this in the paper that Guerrera [the appellee's lawyer] is asking me about why – I don't know what it was in the paper. I don't recall everything that is said in the paper. I was very, very upset. So, I went to see the lawyer. Because I said what is going on here.

Q. Was there anything that you would have said about Mr. O'Connell before the letter that you wouldn't say after the letter?

A. I don't know what you are talking about.

Q. In other words, before the letter if you had an opinion about something that Mr. O'Connell was doing or not doing, if you were talking to someone you would probably speak up; isn't that right? If you saw something in the paper that you didn't like, you might say something?

A. If I saw something I don't like, of course. We all have our own public opinions.

Q. That is correct. And after receiving that letter, did you change your conduct in any way? In other words, if you saw something you didn't like that Mr. O'Connell did or didn't do, after receiving that letter would you still feel free to speak up and say whatever you wanted to say?

A. Yes.

Q. Did that letter change your conduct in any way? In other words, do you still act the same about public issues involving the Board of Education like you would have before receiving the letter?

A. But this letter is nothing to do – this is from –

Q. Mr. Guerrera.

A. Mr. Guerrera.

Q. Not from the Board of Education.

A. That I had to retract or else. And I felt very threatened, and I went to see my lawyer.

The trial court granted the appellee's motion for summary judgment, concluding, in part, that the facts in this case did not support a conclusion that the appellants' First Amendment rights had been injured in fact. It is from that ruling that the appellants appeal.

The petitioner took an appeal, which the Second Circuit decided on November 4, 2002. The Appellate Court held that the petitioner failed to demonstrate that she suffered "some actual, non-speculative chilling effect." The petitioner seeks review of this holding insofar as there is a split in the circuits about whether such a requirement exists to sustain an action arising under 42 U.S.C. § 1983.

REASONS FOR GRANTING THE WRIT

I. There Is A Spilt In The Circuits On Whether A Plaintiff Must Sustain An "Actual Chill" In Order To Prevail In An Action Alleging A First Amendment Violation Of The Right To Freedom Of Speech.

A. A Majority Of Circuits Hold That The Likelihood Of Chilling "A Person Of Ordinary Firmness" Satisfies The Chill Requirement.

There are three elements to a claim for chilling a person's First Amendment rights. A plaintiff must prove: (1) that she has an interest protected by the First Amendment; (2) that the defendant's actions were motivated or substantially caused by her exercise of that right; and (3) that the defendant's actions effectively chilled the exercise

of her First Amendment right. *Curley v. Village of Suffern*, 268 F.3d 65 (2d Cir. 2001); *Connell v. Signoracci*, 153 F.3d 74, 79 (2d Cir. 1998).

These elements do not differ among the circuits; however, there is substantial disagreement among the circuits on the meaning of the chill requirement. The Second Circuit's holding that actual chill is required is the minority view of those circuits having considered the issue. *Sullivan v. Carrick*, 880 F.2d 1, 4 (1st Cir. 1989) ("must allege that . . . speech was in fact chilled or intimidated").

A majority of circuits take a different view, requiring only that a tortfeasor's acts be such as to chill "a person of ordinary firmness." *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998); *Crawford-el v. Britten*, 93 F.3d 813, 826 (D.C. Cir. 1996) (en banc), *rev'd on other grounds*, 523 U.S. 574 (1998); *Worrell v. Henry*, 219 F.3d 1197 (10th Cir. 2000); *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283 (9th Cir. 1999).

As the District of Columbia Appellate Court has observed, "it would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity." *Crawford-el*, 93 F.3d at 826; see also, *Mendocino*, 192 F.3d at 1300.

II. The "Actual Chill" Requirement Serves To Reward A Tortfeasor For Failing In His Unlawful Purposes.

There is no principled reason why a state actor who seeks to chill a person in the exercise of their First

Amendment right should be exempted from liability because he failed to accomplish his unlawful objective. Such reasoning would, in the criminal context, exempt a man who attempts to commit murder from criminal responsibility merely because he failed to achieve his unlawful end. Why should a state actor who strikes at a person exercising a core and fundamental Constitutional value benefit because of his failure?

Criminal jurisprudence punishes defendants who, "but for" some fortuitous factor, would have been guilty of some crime. "Factual impossibility" denotes conduct where the objective is proscribed by the criminal law, but a circumstance unknown to the actor prevents him from bringing it about. See W. LaFave & A. Scott, Handbook on Criminal Law 438-45 (2d ed. 1972). In this case, the defendant-appellee seeks the benefit of a circumstance unknown to him, and one clearly not foreseen by him. When criticized by a citizen, he writes a letter designed to chill. The very purpose of the letter is to chill. Because the letter missed its mark, he now benefits. It makes no sense. The fortuity in this case is the fact that the defendant-appellee chose particularly thick-skinned targets. It would be paradoxical to relieve him from liability because he failed to accomplish his objective.

III. A Majority OF Circuits Avoid Rewarding A Tortfeasor For Failure And Avoid Injustice By Following An Objective Standard Requiring Something Less Than "Actual Chill."

The Sixth Circuit's standard for determining whether speech is chilled avoids the pitfall of state actor's benefitting from the failure of his unlawful intent. "In order to prove a claim for retaliation, a plaintiff must establish the

following elements: (1) that the plaintiff was engaged in a constitutionally protected activity; (2) that the defendant's adverse action caused the plaintiff to suffer an injury that ***would likely chill a person*** of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights." *Bloch v. Ribar*, 156 F.3d 673, 679 (6th Cir. 1998) (emphasis added).

The difference between conduct that "would likely chill a person" under the *Ribar* standard and conduct that "actual chills" under *Davis* is significant and real. The *Davis* test unwittingly and ironically transforms the "chill" requirement into an entirely subjective standard, the very sort of standard explicitly rejected by the United States Supreme Court in *Laird v. Tatum,* 408 U.S. 1, 13-14 (1972). It also unintentionally permits a state actor to defend successfully a lawsuit merely because of the effect of his conduct. Put another way, even the most appalling behavior by a state actor will yield summary judgment if the defendant is either thick-skinned enough, or perhaps too daft, to be bothered by the conduct.

This cannot be what the Supreme Court had in mind when it discussed the chill requirement. First, the *Laird* decision did not address the merits of the appellants' argument in this case. All that is required in *Laird* is "a claim of specific present objective harm or a threat of specific future harm." *Laird*, 92 S.Ct. 2326. The Court ruled that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; 'the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.' *United Public*

Workers of America (C.I.O) v. Mitchell, 330 U.S. 75, 89, 67 S.Ct. 556, 564, 91 L.Ed. 754 (1947)" *Id.* The plaintiff in the *Laird* case sought a declaratory judgment and brought a claim for injunctive relief to prevent surveillance of lawful and peaceful civilian political activity. It was not a claim for damages. The Supreme Court's language about subjective chill did not address the merits of claim presented in this case. The doctrinal concerns about rendering prospective advisory opinions are entirely absent in this case.

The *Ribar* standard avoids the infirmities of a strictly subjective test. It imports a sense of objective reasonableness into the law, thus shielding state actors from frivolous suits by those whose sensibilities are perhaps too dear in a republic embracing robust debate. It also avoids the pitfall of permitting a defendant to benefit from his own failure. Whether conceptualized as a strict objective standard or a subjective/objective test, *Ribar* permits the First Amendment to have real meaning in the context of a claim arising under 42 U.S.C. § 1983 by permitting to jurors to make reasoned decisions about public officials who abuse their positions of authority and attempt to stifle criticism.

IV. The "Actual Chill" Analysis Is Really A Question Of Damages.

Cases arising under 42 U.S.C. § 1983 seek to vindicate the rights of ordinary people whose federal rights have been violated by state actors. Our case law makes clear that such suits can succeed even if only nominal damages are awarded. Thus, in the Circuit, a person prevailing in a civil rights action, but receiving only nominal damages, can still obtain punitive damages and attorney's fees

under 42 U.S.C. § 1983. Implicit in these holdings is a recognition that a person can prevail in a civil rights suit without proving actual damages. There is no principled reason why First Amendment cases should be treated differently.

Actual damages are never presumed merely from the fact of a constitutional violation. *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986). Thus, in cases in which a plaintiff prevails but a jury concludes that there were no compensatory damages, a plaintiff is entitled to at least $1.00 in nominal damages. *Robinson v. Cattaraugus County*, 147 F.3d 153 (2d Cir. 1998). A verdict of zero is not permitted if a plaintiff succeeds in proving violation of his rights. *Gibeau v. Nellis*, 18 F.3d 107 (2d Cir. 1994). Punitive damages may be awarded in cases in which no compensatory damages have been awarded. *King v. Macri*, 993 F.2d 294, 297-98 (2d Cir. 1993); *Robinson v. Cattaraugus County*, 147 F.3d 153, 161 (2d Cir. 1998); *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996).

Similarly, attorneys' fees may be awarded to a plaintiff who obtains only nominal damages, and who fails to prove actual damages. *Carroll v. Blinken*, 105 F.3d 79 (2d Cir. 1997) (minimal success warrants substantial reduction in fees); *McCardle v. Haddad*, 131 F.3d 43 (2d Cir. 1997) (not an abuse of Court's discretion to award a mere 33 cents in fees on a nominal damage award). Although the United States Supreme Court has made clear that attorney's fees awards in such cases may be granted, the Court has not held that such fees must be awarded. *Farrar v. Hobby*, 506 U.S. 103 (1992).

Certainly, nothing in these cases requires this Court to conclude that the element of actual chill is merely a

means of proving damages. But the holdings in the cases recited herein suggest that this Court has long recognized the intrinsic value of proving the breach of a Constitutional right. Thus, where force is used and no damage can be proved, a plaintiff is entitled to nominal damages, and potentially to punitive damages and attorney's fees. Where a plaintiff proves that he was unlawfully seized, a plaintiff is entitled to nominal damages, and may be awarded both punitive damages and attorney's fees.

CONCLUSION

For the reasons stated above the Petition for Certiorari should be granted.

Respectfully submitted,

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EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: October 22, 2002

Decided: November 4, 2002)

Docket No. 02-7170

LYDIA COLOMBO,

Plaintiff-Appellant,

–v.–

RAYMOND O'CONNELL,

Defendant-Appellee.

Before:

WINTER AND CABRANES, *Circuit Judges,*

and JONES,* *District Judge.*

Appeal from a judgment of the United States District Court for the District of Connecticut (Janet C. Hall, *Judge*), granting summary judgment to the defendant on the plaintiff's claim, brought pursuant to 42 U.S.C. § 1983, that he violated her First Amendment rights when he threatened to sue her civilly for libel if she did not retract

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* The Honorable Barbara S. Jones, of the Southern District of New York, sitting by designation.

a petition accusing the defendant, who serves as the Superintendent of schools for the Town of Stratford, Connecticut, of dishonest and illegal behavior.

Affirmed.

NORMAN A. PATTIS, New Haven, CT, *for Plaintiff-Appellee.*

RICHARD BUTURLA, *Berchem, Moses & Devlin,* Milford, CT, *for Defendant-Appellant.*

PER CURIAM

Plaintiff Lydia Colombo ("Colombo") brings this action pursuant to 42 U.S.C. § 1983 against the defendant, Raymond O'Connell ("O'Connell"), the Superintendent of Schools for the Town of Stratford, claiming that O'Connell violated her First Amendment right to free speech. The violation, Colombo claims, occurred when O'Connell threatened to sue her civilly for libel after she filed a petition for a recall vote of the Town of Stratford Board of Education that alleged " 'illegal and unethical behavior on the part[ ] of [O'Connell].' " *Colombo v. O'Connell,* 2001 WL 1682575, *1 (D.Conn. December 27, 2001) (slip.op.) (quoting Def.'s Mem. of Law in Supp. of Mot. for Summ. J., Ex. A).

The District Court held that Colombo did not allege any facts demonstrating injury to – or indeed, any affect whatsoever on – Colombo's exercise of her free speech rights, and granted summary judgment to the defendant. Colombo's counsel does not contend that summary judgment was inappropriate because of the existence of any

disputed material issue of fact or because the District Court's judgment is inconsistent with the law of our Circuit. Indeed, counsel does not allege any legal error by the District Court. Rather, he invites us to convene an *en banc* court to overrule our precedents and dispense with our requirement that a state actor cause a party to suffer some actual injury to his or her First Amendment rights before that party has standing to pursue a Section 1983 claim on the grounds that his or her First Amendment rights have been injured. We decline this invitation to recommend to our colleagues that we convene an *en banc* court in order to adopt the plaintiff's proposal that parties who have suffered no harm nevertheless should have standing.

* * *

We review *de novo* a grant of summary judgment. Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *see also Hermes Int'l v. Lederer de Paris Fifth Ave., Inc.,* 219 F.3d 104, 107 (2d Cir. 2000). In assessing the record to determine if such issues exist, all ambiguities must be resolved and all inferences drawn in favor of the nonmovant. *Golden Pacific Bancorp v. F.D.I.C.,* 273 F.3d 509, 514 (2d Cir. 2001).

To state a claim under Section 1983, a plaintiff must allege facts indicating that some official action has caused the plaintiff to be deprived of his or her constitutional rights – in other words, there is an injury requirement to state the claim. *Spear v. Town of W. Hartford,* 954 F.2d 63, 67 (2d Cir. 1992). In this case, Colombo need not show that

she was silenced by O'Connell's threatened suit – the First Amendment protects the right to free speech so far as to prohibit state action that merely has a chilling effect on speech. *Laird v. Tatum,* 408 U.S. 1, 12-13 (1972) (stating that "constitutional violations may arise from the deterrent, or 'chilling' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights."); *cf. Levin v. Harleston,* 966 F.2d 85, 89-90 (2d Cir. 1992) (holding university's implicit threats of future censure against faculty sufficient to violate First Amendment rights).

However, to sustain her claim, Colombo is required to show that the defendant's actions had some actual, non-speculative chilling effect. *Spear,* 954 F.2d at 67-68. Because Colombo testified in her deposition that her speech was not restricted in fact by O'Connell's letter, that she "still felt free to speak up about whatever she wanted to say" after receiving O'Connell's letter, *Colombo,* 2001 WL 1682575, *1 (citing Colombo Dep. at 11), and alleged no actual affect on the exercise of her First Amendment rights at all, Colombo's claim fails.

Spear, which presented another Section 1983 claim against a Connecticut town for violating a resident's First Amendment rights, is illustrative of our jurisprudence on this question. In *Spear,* a resident of the Town of West Hartford claimed that the Town had violated his First Amendment rights when it instituted a lawsuit against him. 954 F.2d at 63. We affirmed the district court's dismissal of Spear's claim on the grounds that Spear had failed to state a claim because he had not alleged an actual chilling effect and admitted that he had not changed his behavior at all as a result of the town's actions. *Id.* at 68. Absent any injury, we concluded, the plaintiff lacked

standing. *Id.; cf. Mozzochi v. Borden,* 959 F.2d 1174, 1178-80 (2d Cir. 1992) (holding, in qualified immunity context, that no constitutional deprivation occurred where plaintiff's speech undisputedly was not inhibited by town's filing and prosecution of criminal charges); *cf. also Bordell v. Gen. Elec. Co.,* 922 F.2d 1057, 1060-61 (2d Cir. 1991) (holding insufficient for standing a subjective fear of prosecution as grounds to establish chilling effect, where allegations are unsubstantiated and record presents evidence to the contrary).

Even if Colombo had alleged an actual chilling effect, her claim still would fail because O'Connell was not acting under color of state law when he threatened to sue her. A plaintiff fails to state a claim under Section 1983 where the plaintiff does not sufficiently allege that the defendant acted under color of state law. *Monsky v. Moraghan,* 127 F.3d 243, 245 (2d Cir. 1997) (holding that the sufficiency of a color-of-law allegation is to be tested under Fed. R. Civ. P. 12(b)(6); rejecting the position adopted by several other circuits that the color-of-law allegation is jurisdictional). An official "acts under color of state law" for Section 1983 purposes when the official exercises a power "possessed by virtue of state law and made possible only because the wrongdoer is cloaked with the authority of state law." *Id.* (quoting *West v. Atkins,* 487 U.S. 42, 49 (1988)).

O'Connell privately retained a lawyer to write a letter to Colombo stating that O'Connell would sue Colombo privately if she did not retract the statements about him that he alleged were libelous. He exercised no special powers "'possessed by virtue of state law,'" nor were his actions made possible "only because [he was] clothed with the authority" of state law. *Monsky,* 127 F.3d at 249 (quoting *West,* 487 U.S. at 49). Colombo does not claim on

appeal that O'Connell acted in an official capacity, nor that he employed or abused any power of his office. In fact, counsel for Colombo fails entirely even to claim on appeal that O'Connell acted under color of state law in his capacity as an officer of the state. Thus, Colombo has failed to state a claim under Section 1983.

In fact, far from O'Connell being foreclosed from bringing suit against Colombo in his private capacity, the right of a private individual "'to sue and defend in the courts" is itself protected by the First Amendment because it is the "right conservative of all other rights [which] lies at the foundation of orderly government,'" *Baker v. F and F Inv.*, 470 F.2d 778, 784 (2d Cir. 1972) (quoting *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907) (alteration in original)). It is well-established "that public employees do not check all of their First Amendment rights at the door upon accepting public employment." *Lewis v. Cowen,* 165 F.3d 154, 158 (2d Cir. 1999). O'Connell, therefore, had no obligation to refrain from suing Colombo privately merely because he currently serves as the Superintendent of Schools of the Town of Stratford, nor did he violate her First Amendment rights by doing so.[1]

[1] O'Connell's letter to Colombo requesting that she retract her allegedly libelous statements, although protected independently as an exercise of free speech, also enjoys a protection derivative of that accorded to the right to sue because, under Connecticut law, a party is required to request a retraction of the offending statements before he or she may claim certain damages in an action for libel. Conn. Gen. Stat. § 52-237 (1991).

Taken together, counsel for Colombo's positions that (i) a plaintiff should have standing under Section 1983 where the plaintiff cannot allege any harm from the defendant's actions, and (ii) that any individual employed by the state bears Section 1983 liability for private actions he or she did not undertake under color of state law, would result in a regime in which individuals employed by the state would be liable under Section 1983 for their private and harmless acts.

The judgment of the District Court is **AFFIRMED**, substantially for the reasons stated by Judge Hall in her Ruling of December 27, 2001 on the defendant's motion for summary judgment.

EXHIBIT B

2001 WL 1682575 (D.Conn.)

United States District Court, D. Connecticut.

Lydia COLOMBO Plaintiff,

v.

Raymond O'CONNELL Defendant.

No. CIV.A. 300CV1559JCH.

Dec. 27, 2001.

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [DKT. NO. 18]

HALL, District J.

In this case, plaintiff, Lydia Colombo ("Colombo"), claims that the defendant, Raymond O'Connell ("O'Connell"), threatened her with a lawsuit in violation of her First Amendment right to free speech after the plaintiff filed a petition for a recall vote of the Town of Stratford Board of Education. The plaintiff also alleges state pendent claims for intentional and negligent infliction of emotional distress.

In his motion for summary judgment, O'Connell argues that no genuine issue of material fact exists as to whether the defendant chilled the plaintiff's exercise of her First Amendment rights, whether the defendant acted under color of law, and whether the defendant is entitled to qualified immunity.

For the reasons stated below, the defendant's motion is granted.

I. FACTS

On August 1, 2000, Colombo and two other individuals filed a petition with the Town of Stratford Clerk requesting a recall election for the members of the Stratford Board of Education. The body of the petition alleged the Board concealed "illegal and unethical behavior on the part[ ] of the Superintendent." Def.'s Mem. of Law in Supp. of Mot. for Summ. J., Ex. A. O'Connell, the Superintendent of Schools for the Town of Stratford, asked a private attorney to notify the petition's signatories that the allegations were libelous and threaten a legal action if the petition was not retracted. *Id.* at Ex. B. O'Connell also printed a demand for a retraction in the local newspaper. In her deposition, Colombo testified that, after receiving the letter she still felt free to speak up about whatever she wanted to say. Colombo Dep. at 11. She went on to testify that she never retracted what was said in the petition and, after being told that there was no right of recall for Board of Education members, she filed suit in federal court to defend her right to pursue the petition. Id. at 12-13.

II. DISCUSSION

A. Standard of Review

Summary judgment is only appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Hermes Int'l v. Lederer de Paris Fifth Ave, Inc.,* 219 F.3d 104, 107 (2nd Cir.2000). The burden of showing that no genuine factual dispute exists rests upon the moving party. *Carlton v. Mystic Transp., Inc.,* 202 F.3d 129, 133 (2d Cir.2000) (citing *Gallo v. Prudential Residential Servs., Ltd. Partnership,* 22 F.3d 1219, 1223 (2d Cir.1994)). In

assessing the record to determine if such issues do exist, all ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 721 (2d Cir.1994). When reasonable persons, applying the proper legal standards, could differ in their responses to the questions raised on the basis of the evidence presented, the question is best left to the jury. *Sologub v. City of New York*, 202 F.3d 175, 178 (2d Cir.2000).

B. § 1983

To sustain her cause of action under § 1983, Colombo must present facts that indicate a deprivation of constitutional rights. *Spear v. Town of W. Hartford*, 954 F.2d 63, 67 (2d Cir.1992). The First Amendment protects individuals' right to free speech and extends so far as to prohibit state action that merely chills speech. But, at the very least, the plaintiff must present evidence that the defendant's actions had an actual, non-speculative chilling effect on plaintiff's speech. *Id.* at 67-68 (holding that a lawsuit initiated by West Hartford and corresponding injunction as a basis for a First Amendment violation under § 1983 were insufficient to survive a 12(b)(6) motion where plaintiff did not allege that he changed his behavior at all in response); *cf. Mozzochi v. Borden*, 959 F.2d 1174, 1178-80 (2d Cir.1992) (holding, in qualified immunity context, that no constitutional deprivation occurred where it was undisputed that the plaintiff's speech was not inhibited by town's filing and prosecution of criminal charges). The Second Circuit has even concluded that unsubstantiated allegations of chilled speech do not satisfy the injury-in-fact prong for standing. *Bordell v. Gen. Elec. Co.*, 922 F.2d

1057, 1060-61 (2d Cir.1991) (holding insufficient for standing a subjective fear of prosecution and allegations of conduct forgone as grounds to establish chilling effect, where allegations are unsubstantiated and factual record presents evidence to the contrary).

In this case, Colombo commented on the threatened litigation's effect on her behavior. Colombo did not stop speaking about the issue and went so far as to file a lawsuit in order to pursue her right to bring a petition regarding a reelection. While Colombo did testify that she felt threatened by the letter and went to see her lawyer, Colombo Dep. at 13, the court finds that this is not enough to establish a chilling effect. Colombo's actions subsequent to receiving the letter indicate that, however she may have felt about the possibility of a lawsuit, she went on to continue to speak about the matter and pursued federal litigation. Colombo's speech was clearly not inhibited by the letter.

These facts do not rise to the level of a deprivation of constitutional rights. Nothing in the complaint or evidence provided by the plaintiff suggests any actual chilling effect on her speech. Therefore, O'Connell's letter did not deprive Colombo of her First Amendment rights, and she cannot maintain an action under § 1983.[1]

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[1] Proof of a deprivation of constitutional right is the first prong for analyzing qualified immunity for state officials. *Conn v.. Gabbert,* 526 U.S. 286, 290 (1999). If the plaintiff cannot prove violation of a constitutional right, then the defendant official would be entitled to qualified immunity. Although qualified immunity would serve as alternative grounds for this ruling using the same analysis, the court does not

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C. State Law Claims

Finally, the plaintiff has alleged pendant state claims for intentional and negligent infliction of emotional distress. Under 28 U.S.C. § 1367(c)(3), "[t]he district courts may decline to exercise supplemental jurisdiction over a [state law] claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). While dismissal of the state claims is not absolutely mandatory, *Rosado v. Wyman,* 397 U.S. 397, 403-05 (1970); *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350 n. 7 (1988), the basis for retaining jurisdiction is weak when the federal claims are dismissed before trial. *United Mine Workers v. Gibbs,* 38 U.S. 715, 726 (1966). Accordingly, the court declines to exercise jurisdiction over the state law claims, and those claims are dismissed without prejudice.

III. CONCLUSION

For the foregoing reasons, O'Connell's Motion for Summary Judgment [Dkt. No. 18] is GRANTED, and the pendant state claims are dismissed. The Clerk is directed to close the case.

SO ORDERED.

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reach the question because the plaintiff has not proven they have a cause of action.